FILE COPY

Office Supreme Court
F
NOV 1
JAMES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 520

VIRD O. CUDD,

Appellant,

vs.

GALE A. MATHERS, Judge of the Ninth Judicial Circuit of the State of Illinois,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

JURISDICTIONAL STATEMENT

EDWARD B. LOVE,
Love & Beal,
104½ South Main Street,
Monmouth, Illinois.

CHARLES S. RHYNE,
S. WHITE RHYNE, JR.,
Rhyne, Mullin, Connor & Rhyne,
400 Hill Building,
Washington 6, D. C.
Counsel for Appellant.

INDEX

	Page
Jurisdictional Statement	1
Opinion Below	1
Jurisdiction	2
Questions Presented	4
Statutes Involved	7
Statement	7
Substantiality of Questions Involved	12
Appendix A	16
Appendix B	19

Authorities Cited

Decisions

Aspen Mining & Smelting Co. v. *Billings*, 150 U.S. 31	2
Atherton v. *Fowler*, 91 U.S. 143	3
Crane Iron Co. v. *Hoagland*, 105 U.S. 701	3
Detroit & M. R. Co. v. *Mich. R. Comm.*, 240 U.S. 564	3
Ex parte Virginia, 100 U.S. 339	3
Gallimore v. *Dye*, 21 F.R.D. 283	12
Gelston v. *Hoyt*, 3 Wheat. 246	3
Gorman v. *Washington University*, 316 U.S. 98	3
Hamilton v. *University of California*, 293 U.S. 245	4
Hammond Packing Co. v. *Arkansas*, 212 U.S. 322	15, 3
Hayes v. *Mich. Central R. R. Co.*, 111 U.S. 228	4
Heiner v. *Donnan*, 285 U.S. 312	15
Hodges v. *Snyder*, 261 U.S. 600	3
Hovey v. *Elliott*, 167 U.S. 409	15
Illinois v. *Board of Education*, 333 U.S. 203	4
Kavanaugh v. *Washburn*, 387 Ill. 204, 56 N.E. 2d 420	11
King Mfg. Co. v. *Augusta*, 277 U.S. 100	4
McPherson v. *Blacker*, 146 U.S. 1	3
Michigan Central R. Co. v. *Mix*, 278 U.S. 492	3
Missouri ex rel. St. Louis, B. & M. R. Co. v. *Taylor*, 266 U.S. 200	3

Page

Mt. Vernon-Woodbury Cotton Duck Co. v. *Alabama Interstate Power Co.*, 240 U.S. 30 3
New York ex rel. *Bryant* v. *Zimmerman*, 278 U.S. 63
People ex rel. Terry v. *Fisher*, 12 Ill. 2d 231, 145 N.E. 2d 588 ..... 2, 7, 12, 13, 16
Rescue Army v. *Municipal Court*, 331 U.S. 549 3
Stratton v. *Stratton*, 239 U.S. 55 3
Truax v. *Corrigan*, 257 U.S. 312 15
Underwood v. *McVeigh*, 131 U.S. cxix 3
Webster v. *Reid*, 11 How. 437 3
West v. *Amer. T. & T. Co.*, 311 U.S. 223 16

Constitutions, Statutes and Rules

Constitution of the United States, Amendment XIV, 3, 4, 5, 6, 12, 13, 14
Constitution of the State of Illinois of 1870 2
28 U.S.C. § 1257(2) 2
28 U.S.C. § 2101(c) 2
Illinois Civil Practice Act 8, 13
Illinois Revised Statutes, 1957, chap. 110 ..... 7, 8, 10, 13, 16
Illinois Session Laws of 1955 7
Rules of the Supreme Court of the United States 2
Rules of the Supreme Court of Illinois, 5, 7, 8, 9, 10, 11, 13, 16
Rule of Federal Procedure 26(b) 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No.

VIRD O. CUDD,

Appellant,

vs.

GALE A. MATHERS, Judge of the Ninth Judicial Circuit of the State of Illinois,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of the Supreme Court of the State of Illinois, entered on June 18, 1958, denying appellant's motion for leave to file a petition for a writ of mandamus and submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinion Below

No opinion was delivered in the Supreme Court of the State of Illinois in this case. The order of the Court appears in Appendix B, *infra* at 19.

Jurisdiction

Appellant, a party to an automobile accident case, was ordered at trial to disclose whether he had insurance protection, what kind, and how much. This suit was brought in the Supreme Court of the State of Illinois for leave to file a petition for a writ of mandamus to direct the trial judge who entered said order to vacate it. Jurisdiction to adjudicate the mandamus proceeding from which this appeal is taken was given to the Illinois Supreme Court by Article VI, Sections 1 and 2 of the Constitution of the State of Illinois of 1870. It has been exercised in the case of *People* ex. rel. *Terry* v. *Fisher*, 12 Ill. 2d 231, 145 N. E. 2d 588, which also required disclosure of insurance coverage. The judgment of the Supreme Court of the State of Illinois in the instant mandamus suit was entered on June 18, 1958. There was no order respecting a rehearing. Notice of appeal was filed in that Court, whose Clerk possessed the only complete record of said mandamus suit and of the suit out of which it arose, on September 16, 1958. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by title 28, United States Code, section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

1. The appeal is timely. *Aspen Mining & Smelting Co.* v. *Billings*, 150 U.S. 31; Rules 10, 11, 12, 13 and 15 of the Revised Rules of the Supreme Court of the United States; Section 2101(c) of title 28 of the United States Code.

2. There is jurisdiction to entertain an appeal from the judgment of the highest court of a State in its original proceeding to deny or award a writ of mandamus or other writ to compel the action or non-action of state judicial or other officers. Such judgment is final and appealable within section 1257 of title 28 of the United States

Code. *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568; *Michigan Central R. Co.* v. *Mix*, 278 U.S. 492, 494; *Missouri* ex rel. *St. Louis, B. & M. R. Co.* v. *Taylor*, 266 U.S. 200, 206; *Vernon-Woodbury Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U.S. 30; *Detroit & M. R. Co.* v. *Mich. R. Comm.*, 240 U.S. 564, 570-71; *McPherson* v. *Blacker*, 146 U.S. 1, 24.

3. There is jurisdiction of an appeal from state court mandamus cases which are distinct, adversary and independent proceedings resulting in a final and appealable judgment. *Detroit & M. R. Co.* v. *Mich. R. Comm., ibid; Hartman* v. *Greenhow*, 102 U.S. 672, 676.

4. There is jurisdiction of an appeal from a judgment of the highest state court in which a decision could be had which possesses the only record of the litigation from which it arose, which alone affirmatively shows the exhaustion of all State remedies. *Gorman* v. *Washington University*, 316 U.S. 98; *Hodges* v. *Snyder*, 261 U.S. 600; *Stratton* v. *Stratton*, 239 U.S. 55; *Crain Iron Co.* v. *Hoagland*, 105 U.S. 701; *Atherton* v. *Fowler*, 31 U.S. 143; *Underwood* v. *McVeigh*, 131 U.S. exix; *Gelston* v. *Hoyt*, 3 Wheat. 246, 304; *Webster* v. *Reid*, 11 How. 437, 457.

5. There is jurisdiction to entertain an appeal from a judgment of a state court favoring the validity of a statute questioned as repugnant to the "due process" clause of Section 1 of the Fourteenth Amendment of the Constitution of the United States. *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 321, 325.

6. There is jurisdiction to entertain an appeal from the judgment of a state court favoring the validity of a statute questioned as repugnant to the "equal protection" clause of section 1 of the Fourteenth Amendent of the Constitution of the United States. *Ex parte Virginia*, 100 U.S. 339.

7. There is jurisdiction to entertain an appeal from a judgment of a State court favoring the validity of any

regulation of any branch or official of the state which is questioned, if it has the force of law, whether precisely a statute or not. *Illinois* v. *Board of Education*, 333 U.S. 203; *Hamilton* v. *University of California*, 293 U.S. 245, 258; *King Mfg. Co.* v. *Augusta*, 277 U.S. 100, 113; *Hayes* v. *Mich. Central R. R. Co.*, 111 U.S. 228.

Questions Presented

1. Does a court rule which requires a judge to enter an order in the trial of an automobile accident case compelling disclosure of whether appellant has liability insurance protection, what kind and how much, violate the due process and equal protection guarantees of the Fourteenth Amendment of the Constitution of the United States?

2. Does denial of mandamus by the Supreme Court of the State of Illinois to prevent said disclosure of liability insurance, thus giving effect to and enforcing the not appealable orders of said trial judge:

(a) Deprive appellant of a hearing and of his liberty and property without due process of law under section 1 of the Fourteenth Amendment of the Constitution of the United States by creating a conclusive and substantive presumption of law that all of appellant's pleadings are so false as to subject them to be summarily stricken solely for appellant's failure to answer interrogatories as to appellant's ability to satisfy a possible judgment against him, which have no just or reasonable relation to the truth or falsity of said pleadings nor to any issue nor to the merits in said cause, and where the enforcement of the presumption further subjects appellant, as a plaintiff, to non-suit, and to entry of default and judgment without proof against appellant as a counter-defendant and to impending punishment by indeterminate imprisonment and fines?

(b) Deprive appellant of his personal liberty without due process of law under section 1 of the Fourteenth Amendment to said Constitution of the United States in restraining and interfering with appellant's liberty and right to contract and with his free disposition of his personal and private contract of insurance which was voluntarily purchased by appellant solely for his own protection, use and enjoyment subject to no such restraint or interference?

(c) Deprive appellant of his personal liberty from restraint without due process of law under said section of the Fourteenth Amendment by placing appellant in constant jeopardy of imminent punishment by imprisonment in contempt proceedings, as prescribed by Illinois Supreme Court Rule 19-12?

(d) Deprive appellant of his property without due process of law under said section of the Fourteenth Amendment by restraint, compulsion and interference with his personal and private ownership, dominion and right of possession and disposition of an insurance contract which was voluntarily purchased by appellant for his private use, ownership and enjoyment?

(e) Deprive appellant of his property without due process of law under said section of the Fourteenth Amendment in taking and damaging appellant's said personal insurance contract?

(f) Deprive appellant of his property without due process of law under said section of the Fourteenth Amendment in denying him a hearing and a trial by jury before liability be adjudicated against him so as to condemn him without a hearing by the action already enforced against appellant by said trial judge under said law and by the imminent further punishment prescribed to be taken against appellant by Illinois Supreme Court Rule 19-12?

(g) Deprive appellant of procedural due process of law under said section of the Fourteenth Amendment in denying appellant a fair trial, or any trial, before an impartial jury unprejudiced by said calculated compulsive public record knowledge of the extent of appellant's financial worth and capacity to satisfy a possible verdict against him and of the extent of his adversary's relative wealth or poverty?

(h) Deny appellant the equal protection of the laws in violation of said section 1 of said Fourteenth Amendment in arbitrarily, specially and discriminatorily singling out appellant, under penalty of said punishments and as a condition to being heard by jury trial, to disclose record evidence before trial as to his ownership and possession of a personal liability insurance contract and as to the terms and conditions thereof, while not subjecting all other Illinois resident and non-resident litigants similarly circumstanced in similar litigation, who do not choose to own voluntarily such a policy of insurance, to any such compulsive disclosure of their financial condition, assets, liabilities and net worth or other capacity to satisfy any judgment which might be rendered against them as a similar limitation upon their access to the courts, or as a similar condition to their being heard before being condemned?

(i) Deny appellant the equal protection of the laws under said section of said Fourteenth Amendment by so imposing said penalties as punishments calculated to deter appellant, who is not thereby reasonably differentiated and classified from other litigants, from exercising his constitutionally protected right of private ownership of said insurance contract?

(j) Deny appellant the equal protection of the laws under said section of said Amendment, by creating a judicial and also a conclusive and arbitrary presumption of substantive

law precluding his proof, which invidiously discriminates against appellant in presuming that all his pleadings are so false that they may be stricken, from the not rationally connected fact that he failed to answer trial questions as to his financial worth, which fact is not reasonably material to any issue in the pleadings as to any party's liability or damage or as to any other question, thus depriving appellant of the benefit of the general rules of law available to other litigants requiring proof on either side by a preponderance of evidence of the presence or absence of liability and injury?

(k) Deny appellant the equal protection of the laws by so discriminating unreasonably against appellant and those happening to own one kind of private property, as a class, and in favor of the class of those not happening to have such property?

Statutes Involved

Illinois Revised Statutes, 1957, chapter 110, paragraphs 2, 3 and 58(1), (Session Laws of 1955, State of Illinois, pages 2239 and 2264, approved July 19, 1955), and Rules 19-4, 19-11 and 19-12(3) of the Supreme Court of the State of Illinois set forth at Illinois Revised Statutes, 1957, chapter 110, paragraphs 101.19-4, 101.19-11 and 101.19-12(3), all as construed by *People* ex rel. *Terry* v. *Fisher*, 12 Ill. 2d 231, 145 N. E. 2d 588.

Statement

Appellant seeks reversal of a judgment effecting a Court order entered at the trial of an automobile accident requiring disclosure of whether he has insurance liability protection, what kind and how much.

Appellant is the plaintiff and counterdefendant in an action commenced by him against Lee H. Van Tuyl, as defendant, in the Circuit Court of Warren County, Illinois,

in the Ninth Judicial Circuit of Illinois, being Case No. 57-12 in said Court, in which appellant, as plaintiff, is seeking $25,000.00 damages for permanent injuries alleged to have been sustained by him as the result of a collision between a motor vehicle driven by said Lee H. Tuyl and a motor vehicle driven by appellant, which occurred on February 23, 1956, in Warren County, Illinois. That action was commenced on February 20, 1957 (R. 5-15). On September 18, 1957, defendant, Lee H. Van Tuyl, filed his answer to the complaint and his counterclaim seeking $25,000.00 damages for permanent injuries against appellant (R. 22-30). On October 28, 1957, appellant filed his amended complaint and answer to said counterclaim (R. 43-52). On November 26, 1957, defendant, Lee H. Van Tuyl, filed his answer to the amended complaint (R. 58-61). On December 10, 1957, appellant filed his plaintiff's replication to the answer to the amended complaint (R. 62-64).

On April 18, 1958, the defendant and counterclaimant in that case served appellant, as plaintiff and counterdefendant, with notice of his motion for an order directing appellant, as plaintiff and counterdefendant, to answer certain interrogatories, in accordance with the terms of Illinois Revised Statutes, 1957, chapter 110, paragraphs 2, 3, 58(1), 101.19-4, 101.19-11, 101.19-12, comprising paragraphs 2, 3 and 58(1) of the Illinois Civil Practice Act and Rules 101.19-4, 101.19-11 and 101.19-12 of the Supreme Court of the State of Illinois, which interrogatories inquired: (a) whether, on February 23, 1956, there was a policy of public liability insurance insuring appellant, (b) if so, the name and address of such insurer and the number of the policy, (c) if so, the limits of the insurance afforded by such policy for persons and property damage, (d) if so, the name and address of the person having possession of the policy, and (e) if so, the named insured in said policy (R. 69-74). On April 23, 1958, appellant filed his objec-

tions, on grounds of deprivation of substantial rights protected by the United States Constitution as hereafter set forth, among other grounds, to said interrogatories in said cause (R. 76-89). On April 24, 1958, appellant filed additional similar objections to said interrogatories (R. 81-84). Said objections asserted, in detail, that said interrogatories and proceedings were prejudicial to and violative of appellant's federal constitutional rights in substantially the same respects set forth herein under "Questions Presented." They also asserted that said interrogatories were not material nor relative to the issues or merits of said cause. On April 24, 1958, said objections and additional objections of appellant were heard and fully argued and all objections were overruled. Appellant was ordered to answer said interrogatories on or before April 29, 1958 (R. 84-85). Appellant then moved, upon said constitutional and other grounds, to expunge said order and interrogatories, which motion was denied (R. 90-95, 96).

On April 29, 1958, the parties appeared with witnesses for trial and jurors were impaneled and sworn for their *voir dire* examination (R. 96). Defendant and counterclaimant, Lee H. Van Tuyl, objected to proceeding with the trial. Appellant thereupon filed his petition for an order suspending penalties under said Supreme Court Rule No. 19-12 for his failure to comply with the order to answer interrogatories. He prayed that the trial of the cause proceed to its conclusion and that enforcement of penalties be suspended until appellant could exhaust his legal remedies to assert his said constitutional and other objections to the order to answer the interrogatories (R. 98-107). Defendant and counterclaimant, Lee H. Van Tuyl, then filed his answer to said petition (R. 108-115). Arguments were heard thereon and the petition was denied (R. 96-97). Defendant and counterclaimant then moved to remove said cause from

the April 29, 1958, jury trial calendar and to stay the cause generally and indefinitely for refusal of appellant to answer said interrogatories and in order that said court might enter orders punishing appellant as provided by said statutes and rules (R. 116-120). Said motion was allowed over appellant's said objections and the Clerk of said Court was ordered to remove said case from said jury trial calendar and the cause was ordered continued generally and indefinitely (R. 97).

Appellant had no right of appeal from, nor procedure for review of, said trial court's orders dated April 24, 1958 and April 29, 1958. Said trial court's orders were not final and were therefore not appealable nor reviewable within the Illinois judicial system and procedures. Illinois Supreme Court Rules 50(2) and 77(1) compiled at Illinois Revised Statutes, 1957, chapter 110, paragraphs 50(2), and 77(1) provide to the extent pertinent to this appeal, as follows:

> "50(2) If multiple parties or multiple claims for a relief are involved in an action, the court may enter a final order, judgment or decree as to one or more but fewer than all of the parties or claims only upon an express finding that there is no just reason for delaying enforcement or appeal. In the absence of that finding, any order, judgment or decree which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not terminate the action, is not enforceable or appealable, and is subject to revision at any time before the entry of an order, judgment or decree adjudicating all the claims, rights and liabilities of all the parties."
>
> "77(1) Appeals shall lie to the Appellate or Supreme Court, in cases in which any form of review may be allowed by law, to review the final judgments, orders or decrees of the circuit court, the superior court of Cook County, the county courts, the city courts and

other courts whose judgments, orders and decrees are reviewable therein, under such limitations and conditions as may be imposed by law and subject to rules."

Kavanaugh v. *Washburn*, 387 Ill. 204, 208, 56 N. E. 2d 420, 421, holds no Illinois judgment final and appealable unless it terminates all the litigation as to all parties.

Appellant was then 82 years of age and was compelled to wait indefinitely for possible resumption of the trial of his case while remaining in jeopardy of the trial court's enforcement upon appellant of the further penalties provided by said Supreme Court Rule 19-12, including the striking of all appellant's pleadings, adjudging appellant non-suited and in default upon such stricken pleadings, entering a substantial judgment against appellant without proof of liability, and adjudging unlimiting fine and imprisonment of appellant for contempt, thereby depriving appellant of his right to trial and condemning him without a hearing, whereby appellant is irreparably deprived of his constitutional rights, as hereinafter set forth, for such an indefinite period as to be permanent. Thereupon, appellant sought the only relief from said court orders which was open to him within the judicial system and procedures of Illinois, whereby appellant, on June 13, 1958, filed in the Supreme Court of the State of Illinois his motion for leave to file therein his petition for its writ of mandamus with suggestions and complete transcript of the record of said case numbered 57-12 in support thereof, then depositing for filing with the Clerk of Court appellant's proposed petition for writ of mandamus, in accordance with Illinois Supreme Court Rule 46(2), compiled at Illinois Revised Statutes, 1957, chapter 110, paragraph 101.46(2) (R. 1-246). Said motion, suggestions and petition clearly set forth and notified said court in detail of appellant's claims that said statutes and rules violated appellant's rights under section

1 of the Fourteenth Amendment of the Constitution of the United States, as hereinbefore set forth (R. 197 99, 208).

Said petition prayed that summons be issued against Gale A. Mathers, Judge of the Ninth Judicial Circuit of Illinois, who is the appellee herein, returnable as provided by law and by said Court; that said Court stay the further action of said appellee under the orders dated April 24, 1958, and April 29, 1958, and issue its writ of mandamus to the appellee requiring him to order expunged or stricken said interrogatories and all of said proceedings and orders pertaining to or resulting from said interrogatories, and to replace said cause on the next jury trial calendar of said Court for trial in the regular course of the business of said trial court, as provided by law.

On June 18, 1958, the Supreme Court of Illinois entered its judgment denying appellant's motion for leave to file his petition for writ of mandamus of said Court, without opinion, of which judgment a copy is set forth at Appendix B to this Statement (R. 247).

Substantiality of Questions Involved

Appellant respectfully represents that the questions involved in this appeal are substantial. The compulsory insurance disclosure question here presented has not been decided by this Court and is of nation-wide application. In *Gallimore* v. *Dye*, 21 F.R.D. 283, the Federal District Court of the Southern District of Illinois, Eastern Division, has recently held that compulsory disclosure of liability insurance violates Federal Rule 26(b), which is similar to the Illinois discovery rule, and decided that such coerced disclosure would be a federal deprivation of the party's due process rights. That Court specifically rejected the principle of *People* ex rel. *Terry* v. *Fisher*, 12 Ill. 2d 231, 149 N. E. 2d 588.

The issue raised by appellant's contention is that the Illinois statutes questioned here, as interpreted in *People* ex rel. *Terry* v. *Fisher*, 12 Ill. 2d 231, 145 N. E. 2d 588, procedurally and substantively violate, as to him, the due process clause of section 1 of the Fourteenth Amendment. This involves the problem of whether appellant, or any plaintiff or defendant in a personal injury case, may be compelled by an adverse claimant to disclose of public record the existence, coverage and limits of any liability insurance he voluntarily happens to own before and as a condition precedent to proceeding with jury trial of his claim. All this is under penalty of having his claim non-suited, his complaint dismissed, his pleadings stricken, judgment rendered against him, and the proceedings stayed indefinitely, in addition to punishment by unlimited fine and imprisonment for contempt. These penalties are provided for by the challenged discovery rules of the Supreme Court of Illinois, compiled in Illinois Revised Statutes, 1957, chapter 110, paragraphs 101.19-4, 101.19-11, and 101.19-12, and adopted by that Court pursuant to sections 2, 3 and 58 of the Civil Practice Act, being in that same chapter. This identical procedure was approved in *People* ex rel. *Terry* v. *Fisher*, 231 Ill. 2d 231, 145 N. E. 2d 588, in construing the same rules against the challenges there appearing. Appellant submits that such a law condemns him without a hearing and violates the fundamental law of the land.

This Court judicially knows that personal injury cases constitute a considerable segment of the cases in all trial courts and that they commonly involve liability insurance of various kinds and amounts. The challenged law is not part of any comprehensive legislative plan for compulsory, universal, public, negligence insurance compensation. It is entirely court made. This procedure will materially affect a substantial number of litigants. It is submitted

that such a compulsive public disclosure of this or any other litigant's wealth or poverty in a jury trial will necessarily affect him and the public adversely and materially in trials or settlements.

That the question of appellant's liability may be prejudiced to the extent that it is covered by any particular liability insurance dollar limits he may have is not the measure of the trouble. The inherent vice apparent in this procedure goes even beyond its further consequent prejudice to appellant's personal liability in excess of any limits of his liability insurance coverage. Upon this point, the fundamental problem submitted is whether the fairness of the trial of the initial question of appellant's liability itself is contaminated by such a public inquiry into his finances. Appellant contends that this law provides the public with, not a judicial inquiry, but a prejudicial inquisition. The punishments provided for failure to disclose are so arbitrary and drastic as to deter most litigants from standing upon even the most basic constitutional right. The subject matter of the enforced disclosure relates to no issue of liability or damage on the merits and exposes appellant to prejudice resulting from the challenged authorization to compel disclosure of his wealth or poverty before trial. In negligence cases, liability and damage are the proper trial inquiries—not the wealth or poverty of the parties.

The further issue raised by appellant's contention that the Illinois statutes here questioned are repugnant to the "equal protection" clause of section 1 of the Fourteenth amendment, as they affect appellant, is an equally vital one, not only to appellant, but to many others of the public similarly situated. The statutes discriminate against appellant, and in favor of others, as classes, on the basis that only he chose to insure in whole or part against his liability.

This basis is a purely arbitrary distinction without a reason. *Truax* v. *Corrigan*, 257 U.S. 312.

Moreover, these statutes create a judicial, conclusive and arbitrary presumption of substance, that, if appellant fails to disclose his financial worth, his pleadings will be presumed to be false or in bad faith so that they may be stricken. Yet, no rational connection appears between any element in the appellant's pleadings and his financial worth to justify such an arbitrary and conclusive presumption. *Heiner* v. *Donnan*, 285 U.S. 312, 329.

Such naked judicial power may not be validly created by legislation, nor by court rule.

The striking of pleadings and preclusion of proof as a punishment for failure to produce demanded evidence has always been condemned as denial of equal protection. *Hovey* v. *Elliott*, 167 U.S. 409, 413.

Striking pleadings and precluding proof upon a presumption of their falsity warranted only by a failure to disclose evidence upon order has been equally condemned for the the same fatal defect. *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 350.

It is believed that the determination of the constitutional validity of the disclosure ordered herein is substantially and vitally important not only to appellant, but to that considerable segment of the public which owns liability insurance policies.

Respectfully submitted,

EDWARD B. LOVE.
and
CHARLES S. RHYNE,
S. WHITE RHYNE, JR.,
Attorneys for Vird O. Cudd,
Appellant.

APPENDIX A

Text of Statutes Involved

The statutes of the State of Illinois, insofar as they compel insurance disclosure, are Illinois Revised Statutes 1957, chapter 110, paragraphs 2, 3 and 58(1), (Session Laws of 1955, State of Illinois, pages 2239, 2264, approved July 19, 1955). The court rules of Illinois, insofar as they compel insurance disclosure, are Illinois Supreme Court Rules 19-4, 19-11 and 19-12(3), which are collected and printed at Illinois Revised Statutes 1957, chapter 110, paragraphs 101.19-4, 101.19-11 and 101.19-12(3). These statutes and court rules have been construed together by *People* ex rel. *Terry* v. *Fisher,* 12 Ill. 2d 231, 145 N. E. 2d 588, to require disclosure of insurance liability coverage. This construction as to said disclosure is deemed conclusive upon the federal courts. *West* v. *Amer. T. & T. Co.*, 311 U. S. 223.

The Illinois statutes, so far as they compel insurance disclosure, are at chapter 110, paragraphs 2, 3 and 58(1) of the Illinois Revised Statutes. They provide only that:

> "(2)(1) The Supreme Court of this State has power to make rules of pleading, practice and procedure for the city, town, county, circuit, superior, Appellate and Supreme Courts supplementary to but not inconsistent with the provisions of this Act, and to amend the same, for the purpose of making this Act effective for the convenient administration of justice, and otherwise simplifying judicial procedure. Unless otherwise indicated by the text, references in this Act to rules are to rules of the Supreme Court. * * *"
>
> "3. The Supreme Court may provide by rule for the orderly and expeditious administration and enforcement of this Act and of the rules adopted hereunder, including the striking of pleadings, the dismissal of claims, the entry of defaults, the assessment of costs, the assessment against an offending party of the reasonable expenses, including attorney's fees, which any violation causes another party to incur, or other action that may be appropriate."

* * * * *

"58(1) Discovery, admissions of fact and of genuineness of documents and answers to interrogatories shall be in accordance with rules."

Pursuant to said statutory authority the Supreme Court of Illinois has adopted rules for all Illinois Courts of record which compel insurance disclosure only as follows:

"101.19-4(1) Upon a discovery deposition, the deponent may be examined regarding any matter, not privileged, relating to the merits of the matter in litigation, whether it relates to the claim or defense of the examining party or of any other party, including the existence, description, nature, custody, condition and location of any documents or tangible things and the identity and location of persons having knowledge of relevant facts. The deponent may be questioned by any party, and if hostile, may be questioned as if under cross-examination."

"101.19-11(1) Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer, partner or agent. Interrogatories may be served within the same time and under the same circumstances as depositions may be taken. Interrogatories may be served after a deposition has been taken, and a deposition may be taken after interrogatories have been answered, but the court may make appropriate protective orders."

"101.19-11(2) The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them. The party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories and on the other parties within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, extends or shortens the time or excuses service on the other parties."

"101.19-11(3) Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of motion for hearing of the objections. Answers to interrogatories to which objection is made shall be deferred until the objections are determined, but the making of objections to certain interrogatories shall not delay the answering of interrogatories to which objection is not made. If the objections are overruled, the court shall fix the time for answering."

"101.19-11(4) Interrogatories may relate to any matters which might be inquired into by deposition. The answers may be used in evidence to the same extent as the deposition of an adverse party."

"101.19-12 * * * (3) If a party, or any person at the instance of or by collusion with a party, unreasonably refuses to comply with any provision of Rules 17 to 19-12, both inclusive, or Rule 22, or fails to comply with any order entered under said rules, the court may, on motion, in addition to remedies elsewhere specifically provided, order one or more of the following, as may be appropriate: that the party be nonsuited; that his complaint be dismissed; that all or any part of his pleadings be stricken and judgment rendered on the remaining pleadings in the case; that he be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense respecting which discovery is sought; or that further proceedings be stayed pending compliance. In lieu of or in addition to the foregoing, the court may by contempt proceedings compel obedience by any party or person to any subpoena issued or order entered under said rules."

APPENDIX B

Copies of Opinions and Judgments Below

There was no opinion rendered by the Supreme Court of the State of Illinois in this suit. The judgment of the Court is found at R. 247, and is reproduced herein as follows:

"Be It Remembered, that, to-wit: on the 18th day of June, A. D. 1958, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

No. 34918

People ex rel. Vird O. Cudd,

Petitioner,

vs.

Gale A. Mathers, Judge of the Ninth Judicial Circuit, Illinois

Respondent

Mandamus

"And now, on this day, the Court having duly considered the motion by petitioner for leave to file an original petition for writ of mandamus, and being now fully advised of and concerning the premises;

"It Is Hereby Ordered that the motion by petitioner for leave to file an original petition for writ of mandamus be, and the same is, denied."

FILE COPY

Office-Supreme Court
FILED
DEC 1
JAMES

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. 520

VIRDO CUDD,

Appellant,

vs.

GALE A. MATHERS, Judge of the Ninth Judicial Circuit of the State of Illinois,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION TO DISMISS THIS APPEAL.
CERTIFICATE OF SERVICE.

LATHAM CASTLE,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago (1), Illinois, (FInancial 6-2000),
Counsel for Appellee.

RAYMOND S. SARNOW,
Assistant Attorney General,
Of Counsel.

Printed by Authority of the State of Illinois 365

INDEX.

PAGE

Motion to Dismiss this appeal 1

Suggestions in Support of the Foregoing Motion 3

I. The Supreme Court of Illinois has made it clear that denial of leave to file a petition for an original writ of mandamus does not constitute any adjudication upon the merits 3

II. The real party in interest, Lee H. Van Tuyl, defendant and counterclaimant in the personal injury suit in which the questions sought to be presented arose, was not made a party to this appeal and has not been served with notice of appeal 4

III. This appeal presents no substantial Federal question 6

Certificate of Service 10

Table of Cases.

Monroe v. Collins, 393 Ill. 542, at pp. 556-7 3

People ex rel. Terry v. Fisher, 12 Ill. 2d 224, at pp. 237-8 6

p. 239 7

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. 520

VIRD O. CUDD,

Appellant.

vs.

GALE A. MATHERS, Judge of the Ninth Judicial Circuit of the State of Illinois,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION TO DISMISS THIS APPEAL.

Appellee, Gale A. Mathers, Judge of the Ninth Judicial Circuit of the State of Illinois, moves this Court to dismiss this appeal because:

I.

The Supreme Court of Illinois has made it clear that denial of leave to file a petition for an original writ of *mandamus* does not constitute any adjudication upon the merits.

II.

The real party in interest, Lee H. Van Tuyl, defendant in the personal injury suit in which the questions sought to be presented arose, was not a party to this case in the Supreme Court of Illinois, is not a party to this appeal and has not been served with notice of appeal.

III.

This appeal presents no substantial Federal questions.

LATHAM CASTLE,

Attorney General of the State of Illinois,
Suite 900, 160 N. La Salle Street,
Chicago 1, Illinois (FI 6-2000).

Counsel for Appellee.

RAYMOND S. SARNOW,
Of Counsel.

SUGGESTIONS IN SUPPORT OF THE FOREGOING MOTION.

I.

The Supreme Court of Illinois has made it clear that denial of leave to file a petition for an original writ of mandamus does not constitute any adjudication upon the merits.

The Supreme Court of Illinois holds that its order denying leave to file an original petition for a writ of *mandamus* is not an adjudication of any question tendered by the petition sought to be filed and does not comport or intimate any decision upon the merits. In *Monroe* v. *Collins*, 393 Ill. 542, the court, holding that its previous denial of leave to file an original petition for a writ of *mandamus* intimated no expression upon the merits of the cause embodied in the petition sought to be filed, said at pages 556 and 557:

> "What does an order of this court denying an application for leave to file an original action really adjudicate? In the first place, the procedure in making the application and the order of denial does not include the fundamentals of parties and a decision on the merits, which are necessary that a judgment possess before it may be pleaded in bar of a subsequent action. The making of the application and its consideration by this court are *ex parte*. The persons who are to be defendants, if leave to file is granted, are not in court on such application and have no opportunity to resist it. It is clear that if an application for leave to file should be allowed, there would be nothing in the order allowing it that would operate as a bar to the defenses any defendant might interpose. In other words, the order allowing it to be filed is not an adjudication on the merits of the cause of action stated in the complaint or petition. On the other hand, an order denying leave to file is not an adjudication on the merits of the cause of action stated in the pleadings, nor can an order of

> denial operate to estop the plantiff or petitioner from prosecuting an action for the same relief in another court."

Appellant says at page 2 of his Jurisdictional Statement:

> "There is jurisdiction to entertain an appeal from the judgment of the highest court of a State in its original proceeding to deny or award a writ of *mandamus* or other writ to compel the action or non-action of state judicial or other officers."

The statement is correct but has application only to cases where there is a judgment. In this case there was no judgment, there has been no decision as to any Federal constitutional question and therefore there is no jurisdiction of this appeal.

II.

The real party in interest, Lee H. Van Tuyl, defendant and counterclaimant in the personal injury suit in which the questions sought to be presented arose, was not made a party to this appeal and has not been served with notice of appeal.

As appears from the Appellant's Statement of the Case, appellant's application to the Supreme Court of Illinois was for leave to file an original petition for the court's writ of *mandamus* to compel appellee, as Judge of the Ninth Judicial Circuit of the State of Illinois, to expunge from the records of his court certain interrogatories, orders and other proceedings requiring appellant to disclose in a personal injury suit pending in appellee's court information as to whether appellant was the holder of a policy of public liability insurance and if so, its coverage. The defendant and counterclaimant in that personal injury suit was one Lee H. Van Tuyl. He was not made or sought to be made a

party to the petition for *mandamus* that appellant asked leave to file in the Supreme Court of Illinois. Nor has he been served with notice of appeal in this case.

If the order of the Supreme Court of Illinois were otherwise applicable, which it is not, because it does not import adjudication (See Point I, *ante*), Van Tuyl would be a real and indispensable party in interest. If substantial constitutional questions were presented by this appeal, which they are not (see Point III, *post*), Van Tuyl would be directly interested in their decision and adversely affected by the decision of those questions if the decision should be in appellant's favor. He was not made a party to the application for leave to file a petition for *mandamus* and has not been made an appellee in this matter.

The Attorney General of Illinois concedes that in original proceedings for writs of *mandamus* in the Supreme Court of Illinois to compel the expunction of judicial orders, it has been the practice to implead only the judge who entered the orders, not adverse parties to the litigation in which the orders were entered. Whether the practice of compelling the expunction of orders without the presence of real parties in interest as to such orders comports with due process of law has never been passed upon by the Supreme Court of Illinois so far as our research discloses.

But this Court's jurisdiction depends upon having before it the real parties to the controversy sought to be adjudicated or at least their privies and representatives. Van Tuyl, defendant and counterclaimant in the personal injury suit out of which the questions sought to be presented to this Court arose, is an indispensable party to but is absent from this appeal. For this reason the appeal should be dismissed.

III.

This appeal presents no substantial Federal question.

There is indeed a diversity of judicial opinion as to whether a party to an action for personal injuries may be compelled by the process of discovery to disclose the existence and, if existent, the coverage of public liability insurance. The opposing cases are collected and discussed in *People ex rel. Terry* v. *Fisher*, 12 Ill. 2d 224. In the *Terry* case the Supreme Court of Illinois sustained the propriety of a trial court's order compelling such disclosure.

But whatever may be the diversity of opinion as to the propriety of compelling disclosure of public liability insurance, there is no substantial Federal constitutional question presented where, as the Supreme Court of Illinois recognized in the *Terry* case, the State's substantive law is such as to "confer an interest in such a policy on every member of the public that is negligently injured."

The Supreme Court of Illinois said in the *Terry* case, (12 Ill. 2d 231), at pages 237 and 238:

> "Section 388 of the Insurance Code (Ill. Rev. Stat. 1955, chap. 73, par. 1000,) requires certain standard provisions to be included in liability policies affording injured persons a right of action against the insurer if execution against the insured is returned unsatisfied; section 58(k) of the Motor Vehicle Act (Ill. Rev. Stat. 1955, chap. 95½, par. 58k,) provides certain minimum liability insurance coverage for motor vehicles; and section 16 of the Truck Act (Ill. Rev. Stat. 1953, chap. 95½, par. 253,) requires motor carriers to have specified liability insurance policies before permits may be issued. Moreover, we have construed section 388 of the Insurance Code to be declarative of the public policy of this State to protect persons injured by the negligent operation of motor vehicles, and as conferring rights which cannot be defeated after the accident by the con-

certed action of the insured and the insurer. (*Scott* v. *Freeport Motor Casualty Co.*, 392 Ill. 332.) It is clear that the legislature by virtue of the foregoing enactment, has placed liability insurance in a category distinct from the insured's other assets so far as persons injured by the negligent operation of his motor vehicle are concerned."

The Supreme Court of Illinois further said in the *Terry* case at page 239:

"In determining whether liability insurance is discoverable by pretrial interrogatories, we must also take cognizance of the role of insurance companies in such litigation against their insured, for as Justice Holmes noted, 'Judges need not be more naive than other men.' Inasmuch as the insurance company is virtually substituted as a party, (*Maddox* v. *Grauman*, 265 S.W. 2d 939; dissent in *Jeppesen* v. *Swanson*, 243 Minn. 547, 68 N.W. 2d 649, 658,) as far as the investigation and conduct of the defense is concerned, it would seem to be relevant, if not indispensable, that plaintiff's attorney have knowledge of the existence of insurance in order to prepare for the case he has to meet and be apprised of his real adversary. Such knowledge, furthermore, would also lead to more purposeful discussions of settlement, and thereby effectuate the dispatch of court business. This aspect is most significant in terms of effective judicial administration in coping with today's congested dockets which are largely attributable to the increasing volume of personal injury litigation."

It thus appears that whatever may be the rule in other jurisdictions, Illinois' *substantive law* is such as to vest in one injured by the operation of an automobile on Illinois highways an interest in the terms as well as in the proceeds of a public liability policy. This substantive interest may of course be the basis for discovery.

Nor is there any infringement of appellant's constitutional right of access to Illinois courts by conditioning such right of access upon disclosure of material or relevant facts.

including the fact of existence or non-existence of public liability insurance. Nothing is more ancient than judgment of dismissal or upon failure to file a pleading or other document in accordance with the governing law of the sovereign in whose courts litigation is pending. The right to dismissal or default for refusal to respond to an adversary pleading is of the very essence of due process of law.

Appellant suggests that a rule penalizing failure to disclose public liability insurance by striking his pleadings creates an "arbitrary presumption", which "invidiously discriminates against appellant" that "all his pleadings are so false that they may be stricken." No such presumption is involved. The penalty of dismissal or default is regularly imposed for failure to file such pleadings as are required by law. The fact that, technically, disclosure of insurance is denominated "discovery" and not a "pleading" does not raise any constitutional question.

Appellant's suggestion that he is deprived of due process or equal protection because disclosure interferes with his asserted private "right of private ownership" over his policy of insurance is answered by the Illinois substantive law, declared in the *Terry* case, that there is no such private right. Injured persons are third party beneficiaries of automobile public liability insurance in Illinois.

Appellant suggests that the "fairness of the trial of the initial question of appellant's liability" may be "contaminated" by "public inquiry" as to the existence of public liability insurance. There are two answers to this suggestion:

First, many matters are elicited by discovery that would not be admissible in evidence and, if admitted, would be gravely prejudicial. This Court's own Federal Rules of Civil Procedure provide for examination "regarding any

matter, not privileged, which is relevant to the subject matter involved in the action" and that "it is not a ground for objection that the testimony will be inadmissible in the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

Under this rule, for example, heresay statements that would be gravely prejudicial may be elicited if the inquiry might lead to the names of witnesses whose testimony as to the matters inquired of would not be hearsay. There is no presumption that matters elicited by discovery will find their way to members of the jury.

Second, Illinois' substantive law might provide for direct joinder of an insurance carrier as a party. *A fortiori*, Illinois may adopt the less drastic measure of compelling disclosure of insurance in a manner not calculated to expose such disclosure to the jury.

Appellant's suggestion that compulsory disclosure of the existence and extent of public liability coverage denies equal protection in that it discriminates against holders of such insurance may be thus briefly answered:

First: For the reasons stated by the Supreme Court of Illinois in the *Terry* case and noted above, public liability insurance is, in that court's language, "in a category distinct from the insured's other assets so far as person injured by the negligent operation of his motor vehicle are concerned."

Second: The requirement of compulsory disclosure applies to all holders of public liability insurance.

Finally, the considerations developed above dispose of appellant's contention that compulsory disclosure of public liability insurance involves an unreasonable search and seizure.

It is respectfully submitted that no substantial Federal question is tendered by this appeal.

Wherefore appellee prays that this appeal may be dismissed.

LATHAM CASTLE,
Attorney General of the State of Illinois,
Suite 900, 160 N. La Salle Street,
Chicago 1, Illinois, (FI 6-2000),
Counsel for Appellee.

RAYMOND S. SARNOW,
Assistant Attorney General,
Of Counsel.

CERTIFICATE OF SERVICE.

I, Raymond S. Sarnow, a member of the bar of this Court and an Assistant Attorney General of the State of Illinois, hereby certify that on the 5th day of December, 1958, I served five copies of this Motion to Dismiss this Appeal upon Vird O. Cudd, Appellant, by mailing five copies in duly addressed envelopes, with first class postage prepaid to the Attorneys of record as follows:

Edward B. Love,
Love & Beal,
104½ South Main Street,
Monmouth, Illinois.
Charles S. Rhyne,
S. White Rhyne, Jr.
Rhyne, Mullin, Connor and Rhyne,
400 Hill Building,
Washington C, D. C.

RAYMOND S. SARNOW,
Assistant Attorney General of the State of Illinois.

ILE COPY

FILED
JAN 2 1959
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 520

VIRD O. CUDD,

Appellant,

vs.

GALE A. MATHERS, Judge of the Ninth Judicial Circuit of the State of Illinois,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

EDWARD B. LOVE,
Love & Beal,
104½ South Main Street,
Monmouth, Illinois.

CHARLES S. RHYNE,
S. WHITE RHYNE, JR.,
Rhyne, Mullin, Connor & Rhyne,
400 Hill Building,
Washington 6, D. C.

Counsel for Appellant.

INDEX

Page

SUBJECT INDEX

Argument

I. Denial by the Supreme Court of Illinois of Leave to File a Petition for Mandamus in this Case Constitutes an Appealable Judgment 1

II. Lee H. Van Tuyl Has Been Served With Notice of Appeal, Even Though He is Not a Party to This Action and Therefore Not Required to be Served 3

III. Appellee's Arguments That This Appeal Presents No Substantial Federal Question Are Without Merit 4

Conclusion 7

AUTHORITIES CITED

Decisions

Cudd v. *Van Tuyl*, No. 57-12, Cir. Ct., Warren County, Ill. 3

Detroit & M. R. Co. v. *Michigan R. Comm.*, 240 U.S. 564 (1916) 2, 4

Gallimore v. *Dye*, 21 F.R.D. 283 (E.D. Ill. 1958) 6

Monroe v. *Collins*, 393 Ill. 553, 66 N.E.2d 670 (1946) 3

People ex rel. *Terry* v. *Fisher*, 12 Ill. 2d 231, 145 N.E.2d 588 (1957) 3, 5

Roembke v. *Wisdom*, 22 F.R.D. 197 (S.D. Ill. 1958) 5, 6

Wilson v. *Republic I. & S. Co.*, 257 U.S. 92 (1921) 2

Statutes and Court Rules

28 U.S.C. § 1257 (1952) 2

FED. R. CIV. P. 26(b) 5, 6

U.S. SUP. CT. R. 10(2) 4

U.S. SUP. CT. R. 33(1) 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 520

VIRD O. CUDD,

Appellant,

vs.

GALE A. MATHERS, Judge of the Ninth Judicial Circuit of the State of Illinois,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

Appellee has moved to dismiss this appeal upon three grounds, which will be dealt with in this brief separately and in the order in which they were raised in the motion.

I

Denial by the Supreme Court of Illinois of Leave to File a Petition for Mandamus in This Case Constitutes an Appealable Judgment

Appellee maintains that the order of the Illinois supreme court denying appellant leave to file a petition for writ of mandamus is not an appealable judgment because under

state law it is not an adjudication upon the merits. In this argument, appellee errs not only in assuming that an adjudication upon the merits is necessary to constitute an appealable judgment but also in assuming that the order of the supreme court in this case was not an adjudication upon the merits.

The statute defining the appellate jurisdiction of this Court, 28 U.S.C. § 1257 (1952), nowhere requires that a judgment being appealed be a decision on the merits. The only requirement is that the action of the court, whether or not decisive of the merits, effectually terminate the particular case and prevent the appellant from further prosecuting the same. *Wilson v. Republic I. & S. Co.*, 257 U.S. 92, 96 (1921). As stated in *Detroit & M. R. Co.* v. *Michigan R. Comm.*, 240 U.S. 564, 571 (1916):

> This view has prevailed through a century of practice in reviewing judgments and decrees dismissing causes for want of jurisdiction or for other reasons not decisive of the merits.

In the instant case, the denial by the state supreme court of leave to file a petition for mandamus effectually terminated appellant's right to have expunged the trial court order requiring him to furnish information about his insurance coverage. Appellant could not appeal from the order of the trial court because it was interlocutory, and he could not bring mandamus against the trial judge in his own court. He had no remedy other than an original petition for mandamus in the state supreme court, and the denial of leave to file such a petition, regardless of the reason therefor, finally determined his claim of right.

Although not decisive of appealability, the denial of leave in this case was in fact an adjudication upon the merits. Appellant concedes that denial of leave to petition

for mandamus by the Illinois supreme court is not necessarily an adjudication of the merits. The case of *Monroe* v. *Collins*, 393 Ill. 553, 557, 66 N.E. 2d 670, 672 (1946), relied on in appellee's motion to dismiss, cites instances in which the denial may be for reasons other than a decision upon the merits. Nevertheless, a reference to the prior case of *People* ex rel. *Terry* v. *Fisher*, 12 Ill. 2d 231, 145 N.E. 2d 588 (1957) makes it clear that denial of leave in this case was of necessity an adjudication upon the merits.

The *Terry* case involved the identical question at issue in this case. Leave to petition for mandamus was requested and granted, and a decision was rendered on the merits denying the writ of mandamus. The only reason for denying leave to petition for mandamus in this case not present in the *Terry* case was that in this case a decision on the merits had already been rendered. It is obvious that the court's perfunctory judgment without opinion denying leave to petition for mandamus was merely an approval of the previous decision on the merits. In fact, appellee concedes as much in part III of his motion to dismiss when he argues that the holding of the Illinois supreme court in this case was based upon the state "substantive law" recited in the *Terry* case.

II

Lee H. Van Tuyl Has Been Served with Notice of Appeal, Even Though He Is Not a Party to This Action and Therefore Not Required to Be Served

Appellee maintains that the appeal should be dismissed because appellant has failed to serve the notice of appeal on Lee H. Van Tuyl, the adverse party in the negligence action of *Cudd* v. *Van Tuyl* in the Illinois trial court out of which this mandamus action arose. The best answer to this contention is that it is not true. The certificates of service on the notice of appeal show that Van Tuyl was

served (R. 255-56). Moreover, although appellee has raised no question about service of the jurisdictional statement, and although the certificate attached thereto does not show service on Van Tuyl, he was in fact served with the jurisdictional statement at the same time as appellee, and he has been served with this brief as well. Appellant is not seeking to hide the fact of appeal from any person who might be interested.

Although Van Tuyl has in fact been served with all papers in this appeal as a matter of courtesy, he was not required to be served. The rules of this court require service only on the "parties" to a suit. U.S. Sup. Ct. R. 10(2), 33(1). This is an appeal of a mandamus action to which Van Tuyl was not a party. A proceeding in mandamus is an "independent adversary suit." *Detroit & M. R. Co.* v. *Michigan R. Comm.* 240 U.S. 564, 571 (1916).

Appellee concedes that the correct Illinois procedure in mandamus cases of this sort is just what appellant has done, impleading only the trial judge whose order is sought to be expunged. It cannot be thought that this Court would allow an appellant to be barred from obtaining relief for a final deprivation of federal rights in a state case because he followed the recognized procedure provided by the state in the case. Such a holding would allow a state by its procedure to bar an appeal to this Court.

III

Appellee's Arguments That This Appeal Presents No Substantial Federal Question Are Without Merit

Appellee concedes that there is a diversity of judicial opinion as to whether a party may be compelled by pretrial discovery to disclose the existence and, if existent, the coverage of public liability insurance. This alone shows that the question is substantial. Actually, there are many

more cases on each side of this important question than those cited in the *Terry* case and referred to by appellee. A larger group of decisions is cited in the suggestions in support of appellant's motion for leave to file petition for mandamus which were filed with the Illinois court (R. 148-52), and there are even others to exemplify the national urgency of the question raised in this Court, *e.g.*, *Roembke* v. *Wisdom*, 22 F.R.D. 197 (S.D. Ill. 1958).

But appellee argues that there is no federal question because the holding was based on state "substantive law as recited in the *Terry* case." Regardless of whether the grounds for the decision in the *Terry* case be labeled "substantive law," it is obvious that the court in that case and in this could not have held as it did without deciding against the contention, earnestly pressed, that to compel the disclosure of insurance coverage violates federal constitutional rights. In fact, the opinion in the *Terry* case indicated that the constitutional question was passed on. *People* ex rel. *Terry* v. *Fisher*, 12 Ill. 2d 231, 240, 145 N.E. 2d 588, 594 (1957). It is to correct the error of the decision on a federal question that this appeal is being taken.

Appellee's arguments directed at the constitutionality of the compulsory disclosure of insurance coverage require only brief reply:

Appellee argues that disclosure of insurance coverage may be required even though it is not admissible evidence at trial because this Court's own federal rules of civil procedure allow pre-trial examination "regarding any matter, not privileged, which is relevant to the subject matter involved in the action" and state that "it is not a ground for objection that the testimony will be inadmissible in the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b). Appellant readily concedes that the rules

made by the Illinois supreme court for discovery are almost identical with the statutory federal discovery rules. But appellee errs in assuming that disclosure of insurance coverage could be compelled under the federal rules. Evidence of insurance coverage is neither "relevant to the subject matter" involved in a negligence action, nor is it "reasonably calculated to lead to the discovery of admissible evidence." The federal courts, including two federal courts in Illinois, have consistently rejected all efforts to compel insurance disclosure under rule 26. *Roembke* v. *Wisdom*, 22 F.R.D. 197 (S.D. Ill. 1958); *Gallimore* v. *Dye*, 21 F.R.D. 283 (E.D. Ill. 1958); see also cases treated in suggestions in support of appellant's motion for leave to file petition for mandamus (R. 148 52).

Appellee also argues that Illinois law might provide for direct joinder of an insurance company as a party in a negligence action, thus conceding that the law has not done so. Nor has Illinois law made public liability insurance compulsory, except after particular kinds of accidents. Whether or not Illinois law could provide for direct joinder of an insurer without a violation of federal constitutional rights is a question which has not been decided. The unsupported assumption that such joinder could validly be provided for is certainly no basis for the conclusion that compulsory disclosure of insurance coverage does not violate federal constitutional rights.

Finally, appellee argues that compulsory disclosure of insurance does not deny equal protection of the laws because the Illinois court has placed public liability insurance in a "category" distinct from an insured's other assets. But appellee fails to show any reasonable basis for this discrimination against the holders of that particular category of property. Instead, appellee argues that equal protection is afforded because everyone in the particular

class is discriminated against. The same reasoning would justify imposition of a similar pre-trial penalty equally upon all who chance to be rich, or poor, or members of a particular race, or of a particular church or lodge.

Conclusion

For the reasons set forth above and in the jurisdictional statement, it is urged that the motion to dismiss this appeal be overruled as without merit, and that probable jurisdiction of this appeal be noted.

Respectfully submitted,

EDWARD B. LOVE.
and
CHARLES S. RHYNE,
S. WHITE RHYNE, JR.,
Attorneys for Vird O. Cudd,
Appellant.